

length of the period, the statutory intent would not appear to be served by any recognition of a period in excess of 1 year as representative for purposes of this exemption. There would seem to be no employment situation in a retail or service establishment in which a period longer than a year would be needed to represent the seasonal and other fluctuations in commission compensation.

(d) Accordingly, for each employee whose exemption is to be tested in any workweek under clause (2) of section 7(i), an appropriate representative period or a formula for establishing such a period must be chosen and must be designated and substantiated in the employer's records (see § 516.16 of this chapter). When the facts change so that the designated period or the period established by the designated formula is no longer representative, a new representative period or formula therefor must be adopted which is appropriate and sufficient for the purpose, and designated and substantiated in the employer's records. Although the period selected and designated must be one which is representative with respect to the particular employee for whom exemption is sought, and the appropriateness of the representative period for that employee will always depend on his individual earning pattern, there may be situations in which the factors affecting the proportionate relationship between total compensation and compensation representing commissions will be substantially identical for a group or groups of employees in a particular occupation or department of a retail or service establishment or in the establishment as a whole. Where this can be demonstrated to be a fact, and is substantiated by pertinent information in the employer's records, the same representative period or formula for establishing such a period may properly be used for each of the similarly situated employees in the group.

§ 779.418 Grace period for computing portion of compensation representing commissions.

Where it is not practicably possible for the employer to compute the commission earnings of the employee for all workweeks ending in a prior rep-

resentative period in time to determine the overtime pay obligations, if any, for the workweek or workweeks immediately following, 1 month of grace may be used by the retail or service establishment. This month of grace will not change the length of the current period in which the prior period is used as representative. It will merely allow an interval of 1 month between the end of the prior period and the beginning of the current period in order to permit necessary computations for the prior period to be made. For example, assume that the representative period used is the quarter-year immediately preceding the current quarter, and commissions for the prior period cannot be computed in time to determine the overtime pay obligations for the workweeks included in the first pay period in the current quarter. By applying a month of grace, the next earlier quarterly period may be used during the first month of the current quarter; and the quarter-year immediately preceding the current quarter will then be used for all workweeks ending in a quarter-year period which begins 1 month after the commencement of the current quarter. Thus, a January 1–March 31 representative period may be used for purposes of section 7(i) in a quarterly period beginning May 1 and ending July 31, allowing the month of April for necessary commission computations for the representative period. Once this method of computation is adopted it must be used for each successive period in like manner. The prior period used as representative must, of course, as in other cases, meet all the requirements of a representative period as previously explained.

§ 779.419 Dependence of the section 7(i) overtime pay exemption upon the level of the employee's "regular rate" of pay.

(a) If more than half of the compensation of an employee of a retail or service establishment for a representative period as previously explained represents commissions on goods or services, one additional condition must be met in order for the employee to be exempt under section 7(i) from the overtime pay requirement of section 7(a) of the Act in a workweek when his hours